

**Understanding the variations of union's litigation strategies
to promote equal pay. Reflection on the British case**

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Review

Driven by policy making at the European level (Hyman, 2010), statutory intervention in the employment relationship in the UK has grown significantly over the last fifteen years. *“Britain has been experiencing an important shift in the locus of job regulation, from ‘collective bargaining to ‘legal enactment’”*(Colling, 2004, p.555). This in turn has raised important questions about how trade unions can adapt to this new environment. Many scholars have argued that increasingly complicated legislative structures and norms have not ensured direct compliance in the workplace (Dickens, 2012). The fragmentation of the law and the weak articulation of social and legal regulations largely explain the gaps in coverage and compliance (Colling, 2010). Increased individual rights have been criticised for being tentative in ambition and complex in application (Dickens and Hall, 2006) while failing to address the systemic nature of gender and race inequalities. Against this background, the political and academic debate is now focused on consideration of the mechanisms, institutions and processes for rights enforcement. Between purely “voluntarist” approaches and controlling forms of law, other “reflexive” legal mechanisms are being explored as ways to make rights effective (Deakin, McLaughlin and Chai, 2012). While many studies advocate an enhanced role for collective regulation (Dickens, 2007, 2000; Colling and Dickens 1989; Cockburn, 1995) and point to the limits of individual litigation, the ability of British unions to enforce legislation seems variable and constrained. Their weakened position in the policy-making process, their declining membership, the narrowing of collective bargaining coverage and the difficulties they encounter in implementing representative actions cast doubt on the prospect of “recombinant legal strategies” to enforce employment rights (Colling, 2012). While scholars argue that growing litigation fills a space left by the decline of industrial bargaining (Renton, 2012), the process of “juridification” calls for a close investigation of how formal rights are enforced in practice and what roles are assumed by unions.

From this perspective, the use of litigation by British trade unions to promote equal pay seems an interesting case to examine¹. Despite their traditional mistrust of the use of the law and individual rights (Colling, 2011) and their uneasy relationship with the concept of equality (Conley, 2013), British trade unions have used the law in various ways (McCann, 1994) in order to advance both gender and pay equality. They have campaigned for national legislation. Since 1970, they have been making use of European legislation to improve legal norms and build a strong body of case law (Howell, 1996), sometimes with the help of enforcement agencies (Alter and Vargas, 2000; Barnard, 1996). They have developed legal expertise and detailed knowledge of the practicalities of the law and have supported numerous equal pay claims. Compared to other European countries, the level of litigation in this field is very high (Fuchs, 2013) and the role of trade unions in this process quite significant². Furthermore, the equal pay claims and the legal strategies developed by trade unions in order to seek redress have been framed in such a way as to address some of the major limitations academic commentators have identified in the use of the law. First, the claims have generally been joint claims brought by a large number of workers, often poorly qualified and low-paid women, who are usually underrepresented among tribunal cases (Colling, 2006). Second, litigation has sometimes helped to secure bargaining outcomes, forcing employers to engage in negotiating large-scale collective agreements (Colling, 2011).

¹ The five most common categories of claims before the Tribunals in 2010-2011 were unfair dismissal, wages, breach of contract, equal pay and working time claims (Renton, 2012, p.39).
² Most studies show that union support is central to the outcomes of the claim. Applicants with no legal representation have a poor success rate in employment tribunal hearings (Pollert, 2007).

Trade unions as legal intermediaries

However, this use of litigation has not developed consistently over time and across unions (see Table 2). Previous studies have shown that trade unions began to develop legal strategies when the limitations of collective bargaining became evident (Colling, 2006). Nevertheless, litigation has been quite controversial within the trade union movement. Certain reservations pertaining, among other things, to the high financial and emotional costs for plaintiffs and their trade unions, the fear that individual claims may fragment the union movement and the necessary reliance on lawyers (McCann, 1994) have traditionally deterred trade unions from going to law. Defending individual interests can be seen as a drain on resources and time, while not permitting collective benefits to be secured or encouraging active membership (Colling, 2006). Other, specifically British constraints may also deter trade unions from taking legal action. The employment tribunal system itself and the principles of common law render access to justice quite uncertain (Renton, 2012). Problems of low success rates for employees pursuing their rights through tribunals have long been documented (Leonard, 1987; Dickens et al., 1985). Despite the growing range of jurisdictions in which employment tribunals are required to adjudicate, access to justice has been progressively reduced through the restriction of legal aid, the policy of privatising legal enforcement by expanding the no-win, no fee sector (Renton, 2012, Pollert, 2007), increased legal costs for plaintiffs and new obligations to comply with statutory procedures. *“The 2002 Employment Act produced new rights for workers with laws that rendered them further out of reach”* (Pollert, 2007, p.132; Colling, 2004).

Despite these symbolic and practical hurdles, this paper seeks to investigate the conditions under which trade unions have decided to rely upon litigation to further their female members' interests. This focus on trade unions as “legal intermediaries” is quite rare (Colling, 2006). While most scholars have examined the strategies and practices of “cause lawyers” in the promotion of rights (Sarat and Scheingold, 1998), less work has been done on other types of “legal intermediaries”, such as NGOs (Vanhala, 2011) or enforcement agencies (Hepple 2012; Pedriana and Stryker, 2004; Alter and Vargas, 2000; Barnard, 1996), although these organisations are key actors in raising awareness of rights, facilitating (or deterring) access to justice and implementing anti-discrimination law. Previous research has shown that the reality of having recourse to law is more complex than mere adaptation to political contexts (Kitschelt, 1986) or legal opportunity structures (Andersen, 2005). From an interactionist perspective, litigation needs to be analysed in terms of the relations between litigants, their “support structures” (Epp, 1998) and the other “players” involved in the legal process.

In the employment field, other studies emphasize how power in the employment relation shapes workers' perception of their options for enforcing their rights (Albiston, 2005). Besides the fact that employers usually have more power than their employees over the workplace, which can deter employees from resorting to the law for fear of negative consequences, the role of trade unions in releasing information about rights is critical to name the injustice and blame the employer (Felstiner, Abel and Sarat, 1981). However, the use of the law by unions can also be analysed as an attractive strategy *“in circumstances where objectives are unlikely to be secured by collective strength alone”* (Colling, 2006, p.145). Litigation is then seen as a sign of unions' weakened power. Power relations within the trade union movement itself also have to be taken into consideration when looking at the use of the law. In the field of equality rights, industrial relations scholars have pointed out the difficulty unions can have in addressing gendered divergent interests among their members (McLaughlin, 2014; Fredman, 2008; McCrudden, 2007). For example, job evaluation

schemes negotiated with trade unions have sometimes been responsible for increased litigation, as they blatantly reproduced wage differentials or failed to correct them (Kahn and Meehan, 1992; Acker 1989). Implementing equal pay means reassessing gender-blind concepts of skill and jobs by making comparisons between craft and white-collar jobs, men and women's grading structures. British trade unions have frequently been reluctant to do so. In the 2000's, their tendency to preserve the situation of their (more organized and more vocal) male members has exposed unions to litigation in the public-sector³.

Moreover, use of the law is not only embedded in power relations but also interacts with alternative normative systems when "new rights attempt to change long-standing social practices" (Albiston, 2005, p.13), such as institutionalized conceptions of "industrial relations" as well as gendered conceptions of work. Equal pay litigation reveals not only "deep scepticism about the practical value of statutory rights and their formal enforcement" (Colling, 2006, p.152) and trade unionists' preference for collective bargaining but also their implicit representations of the value of women's work. The "underevaluation of women's work" which results in the fact that women are paid less for the same level of efficiency within the same job and are employed in jobs or occupations that are themselves undervalued, is an ongoing process, shaped by the actions of employers, governments, trade unions and other social actors in specific contexts (Grimshaw, Rubery, 2007).

It is argued in this paper that, despite their ability to act as a "support structure" (Epp, 1998) and the framing of their members as "rights holders" (Vanhala, 2011), trade unions have varied in their efforts to use the law in order to enforce equal pay rights. Their willingness to do so has depended not only on their ability to challenge unequal power relations in the workplace and balance their members' diverging interests but also on their capacity for renegotiating the value of women's work. As in previous research (Colling, 2006), I will emphasize the crucial role of individual officers who decided to engage with the law despite few incentives to do so. I argue that, in the early period of the development of trade unions' litigation strategies, low-paid women involved in grass-roots campaigns managed to enlist the support of some fairly militant and strong trade unions in order to obtain new legislation and make the first claims. However, they did not succeed in challenging the gendered nature of the wage hierarchy. In the second phase, it is argued that the European-based legal strategy adopted by the Equal Opportunities Commission facilitated the decision of a few trade unionists to support significant equal pay cases, before coming up against the adversarial nature of the legal strategies developed by employers. I then describe how, in a third phase, the introduction of privatisation and contracting-out policies by the Conservative governments persuaded some public-sector trade unionists to resort to defensive litigation strategies aimed at protecting the interests of their male members, finding a way to defend the wages of low-paid women and forcing public employers to address gender inequalities through collective bargaining. Finally, I reflect on the conditions under which these trade unionists resorted to litigation, emphasising the crucial significance of their ability to challenge implicit assumptions not only about gender and class issues but also about the very role of trade unions.

³ Case *GMB v Mrs Allen and others*, [2007] IRLR 752 ETA.

Methodology

To understand how litigation strategies aimed at tackling pay discrimination have evolved over time and developed in relation to and through interaction with trade unions, employers, enforcement agencies and lawyers, this article builds on a multi-methods approach based on a total of 34 interviews with trade unionists, legal practitioners and experts (see Table 1), archives analysis and statistical data. Interviewees were selected because of their engagement in equal pay landmark cases identified either through media coverage for the most recent cases or through historical documentaries such as the TUC « Winning Equal Pay » film⁴. Long-serving trade union officials helped in finding former local officers, some of whom are now retired. My intention was to understand how equality rights and policies have been utilized by local trade unionists depending on periods. I asked the respondents to narrate the circumstances of the litigation they had been involved with, their role in the legal process, the difficulties they encountered, their relations with the claimants and employers, the role of experts and lawyers and finally their views on the use of the law. To complement these interviews and to cover the 1970s and 80s, I studied the Trades Union Congress Library Collections at London Metropolitan University and the former EOC archives in Manchester. I also collected employment tribunal statistics from 1975 onwards and compiled the data (see Table 2) in order to get an idea of the trends in litigation over the 40-year period. Finally, I went through the legal literature on the landmark equal pay cases since 1984. This project forms part of a comparative project on women and trade unions in France and the UK that is investigating the relations between internal and external equality policies (Author, colleague, 2011). Following McCann's work, this paper adopts a « developmental approach » (McCann, 1994) and divides the development of union litigation strategies for equal pay into a number of stages or phases. The paper examines to what extent and under what conditions trade unionists have turned to the courts to promote equal pay.

1968-1980: grass-roots movements begin to break down trade unions' reluctance to represent women's interests

Historical studies have established that craft unions in the UK fought hard against the inclusion of women (Cockburn, 1983) and supported the stratification of the labour force that maintained women as a class apart (Downs, 1995). Unions defended the preservation of separate pay grades for men and women and were not supportive of equal pay demands, not only because they undermined the struggle for a "family wage" (Rose, 1988) but also in response to employers' strategies of lowering labour costs by hiring women or introducing new technology and more intensive forms of work organization (Downs, 1990). While general unions organizing large numbers of low-skilled workers were more ambivalent towards women and tried to recruit them, they were also reluctant to support equal pay demands and defended the maintenance of separate collective bargaining (Savage, 1988). In the civil service, only skilled women were granted equal pay in 1947. Female teachers had to wait until 1953.

In the UK, the first Equal Pay Act was introduced in 1970, following a memorable strike led by female workers at the Ford factory in Dagenham in 1968. The 187 sewing machinists went on strike to get a re-grading of their jobs, which had been under-evaluated as a new wage structure was being introduced in 1967. While they had been encouraged by their union leaders to adopt an equal pay strategy, they obtained neither equal pay nor the grading they

⁴ Equal pay struggle is now well documented. A movie and now a musical – *Made in Dagenham* – have been produced to relate the epic strike for equal pay in the Ford Dagenham factory.

were asking for. As Sheila Cohen points out trade unions (and management) advocated this equal pay claim for women in order to avoid encouraging male semi-skilled workers across Ford to demand the same re-grading (Cohen, 2013). The women got a pay rise and a promise from Barbara Castle, the Secretary of State for Employment and Productivity, that she would soon introduce equal pay legislation. There were other reasons why national legislation was introduced, including the risk of stricter legislation being imposed by the European Community, which the UK was about to join. The legislation adopted in 1970 gave employers five years to correct the most blatant direct forms of discrimination, such as the persistence of “women’s rates”. Between 1970 and 1980, women workers maintained the pressure on employers and numerous women’s strikes against low wages were reported (Pugh, 2000), some of them explicitly linked to equal pay demands. These ‘hard-fought grass root campaigns’ (Elliott, 1984) were often supported by socialist feminists, affiliated to left-wing organizations (Rowbotham, 2006) and benefited from extensive media coverage in feminist journals, such as *Socialist Women* or *Women’s Voice*. These mobilizations had an impact on the legislation but also on unions. In 1968, the first equal pay conference was held at the TUC⁵. Feminized unions, like NALGO⁶, in the public sector, adopted the charter as policy. The first equality structures were set up within some trade unions.

Following the enforcement of the Equal Pay Act in December 1975, numerous claims were lodged by low-paid women, sometimes with the help of trade unions. However, early studies of the use of the equal pay legislation highlight the unsympathetic attitude of judges, ACAS⁷ experts and trade unionists towards complainants. They often had only a vague understanding of the law and gave incorrect advice (Leonard, 1987) or tried to dissuade claimants from proceeding to the tribunal hearing and pressed them to accept poor offers from employers (Gregory, 1982). Between 1975 and 1982, the number of claims dropped sharply from 1800 in 1976 to 39 in 1982, notably because employers abolished the separate male and female pay scales. In doing so, they reinforced the gendered job segregation and maintained separate collective bargaining for different groups, which made the use of the law more difficult, as the Equal Pay Act stipulates equal pay only for “like work” or “jobs rated as equivalent”.

“Now, following the Equal Pay Act, there was an implementation period. And there was a lot of negotiation within work places to get rid of the separate male and female pay scales. The original Equal Pay Act only covered equal pay for like work. Which is the same or very similar work, or work rated as equivalent under a job evaluation scheme. And so, you know, I would say that once there was this success in getting the Act, the focus of union activity was around those negotiations to get rid of male/female pay structures and to provide equal pay....” (Female senior officer, TUC)

Furthermore, becoming conversant with the new legislation and the financial commitment linked to litigation were perceived as huge burdens for small unions. In feminised unions, such as APEX⁸, or in industries where female workers were numerous (like fishing), the issue of women’s lower pay was dealt with for preference through collective modes of regulation such as the Fair Wages Resolution (Schedule 11⁹), which allowed women who were paid lower rates than the rate of pay for the district in which they were working to make a claim to the Central Arbitration Committee¹⁰ for an increase in pay rates. These collective

⁵ Trade Union Congress

⁶ National Association of Local Government Officers

⁷ ACAS is an organisation devoted to preventing and resolving employment disputes.

⁸ Association of Professional, Executive, Clerical and Computer Staffs

⁹ of the Employment Protection Act (1975)

¹⁰ The CAC is a permanent independent body with statutory powers whose role is to resolve disputes.

mechanisms, which were abolished after Margaret Thatcher came into office in 1979, were seen as more efficient than the use of litigation, even if they were sometimes ignored by male trade unionists.

“There was something called Schedule 11, which said that if you were paying lower rates than the rate of pay for the district in which you worked, and the industry in which you worked, you could make a claim to the Central Arbitration Committee for an increase in pay rates. Well, many women would have been at the bottom of the pay structures, so you can see the impact of that. We also had another mechanism, this was Wages Council. We had a whole series of mechanisms which could be thought of to be as successful as the Equal Pay Act. And they weren’t used, I don’t think, as much as we could have used them. Trade unions run by men, lack of imagination, the old traditional way of negotiating was face to face with the employer. People didn’t think about using these institutions that had been set up.” (Former female legal officer, APEX/GMB)

If the restrictions of the law itself reduced the opportunities for unions to litigate on behalf of their members, this first stage in the use of litigation highlights the importance of power relations between employers and workers, since implementation of the law has to be seen against the background of considerable unrest, including strikes, that characterised British industrial relations in the late 60’s. However employers’ strategies for delaying the implementation of equal pay¹¹ while getting rid of the most obvious discriminations certainly had a deterrent effect on trade unions’ use of litigation. While these early claims helped local trade unionists to accept the principle of equal pay for equal work, the implicit under-evaluation of women’s work had not really been challenged at this stage. At that period, feminist scholars criticized the collusion of unions with management to minimize the effects of the equal pay legislation in the existing grading and pay systems (Snell, 1979).

1980-1988: the EOC stimulates the mobilization of trade unions

Beginning in the early 1980s, the Equal Opportunities Commission¹², which considered the Equal Pay Act to be too limited in its scope adopted a litigation strategy that sought to take advantage of European legislation in order to counter the narrow rulings from the Employment Appeal Tribunal (Alter, Vargas, 2000) and work for the introduction of an “equal value” amendment in 1984. Although it was not described as feminist in the early years of its existence (Gregory, 1987), the EOC used its independence and narrow mandate to develop strategic litigation, picking up the first 60 claims for equal value. This strategy helped to build a strong body of case law and gradually attracted the support of the judiciary (Alter and Vargas, 2000). Its success had a great impact on trade unions, along with other training measures and the support provided for trade unionists in the administration of equal pay claims (paying for the costs, providing legal advice, etc.). The number of claims began to rise again (380 in 1986, 570 in 1987, 1000 in 1988)¹³. These single cases were very often supported by male trade unionists able to identify inequalities in pay and practices and to take action to change them.

¹¹ The sewing machinists got their regrading in 1985.

¹² The EOC was set up under the Sex Discrimination Act 1975 and had statutory powers to help enforce this Act. The EOC was given the power to apply for judicial review, to intervene in court proceedings and to carry out formal investigations.

¹³ The 1984 amendment opened up the possibility of taking cases on the ground of equal value, but took away the provision on collective remedies, via the Central Arbitration Committee.

A well-known trade unionist from the TGWU¹⁴ generated 18 claims between 1983 and 2002¹⁵. Appointed as a full time officer in 1977, he started to develop an interest in equal pay after his wife, an active trade unionist, made him realise that the system they had negotiated in 1979, whereby female part-timers were to be made redundant in preference to male full-timers, was highly discriminatory. He took eight equal value cases in the four years from 1983 to 1987, using a pro-active strategy of raising women's consciousness, giving them information on the existing legislation and addressing their fears and gendered conceptions: *"a few think they ought to earn less than men; a great many don't realize how skilled they are; some are frightened for their jobs"* (Cunnison, 1988, p.9). As well as convincing the women that they should get equal pay, he *"convinced the men that the biggest threat they've got was cheap labour working alongside them"* (Cunnison, 1988, p.29). After having lost a like-work case for the women packers in the Smales fish processing factory in 1981, he decided to take their case again under the new equal value legislation. He enlisted the aid of the EOC, having been let down by the TGWU legal department. The EOC provided him with the services of a professional management consultant to advise on the job evaluation expert report and a barrister to argue the women's case at the tribunal, but he conducted the case himself¹⁶. The women won and the company accepted the judgement and paid up.

Most of these claims in the private sector were brought by feminized unions such as APEX or general unions such as the TGWU¹⁷ or GMB. These unions were used to plant bargaining but in some cases they had clearly expressed a wish to recruit and defend the interests of low-paid women¹⁸. The claims were triggered by the first wave of women officials appointed by these unions (Author, 2013) with the help of very knowledgeable (and feminist) lawyers to fight the cases.

"In 1978, I was appointed as an area organiser by APEX. Coventry is a historic industrial city, very well unionised, with very high union densities. And the union which represented primarily clerical workers had about 80% women membership. So we had high levels of union membership, high numbers of women. Because we were committed to campaigning and committed to women's issues, we had campaigns, for example around cervical cancer screening for women. And we started to look at some of the pay issues, led by Rita Steven, who was the national officer and who played a particular role in this. She said, every officer must have three equal pay claims going. So we went and looked around the factories, and started running claims." (Former male organizer, APEX)

At the local level, some trade unionists certainly saw legal litigation on equal pay as a possible lever to attract new (female) members. At the same time, they also saw the potential of equal pay litigation as a means of fighting the public-sector pay freeze imposed by the Tory government, as a former COHSE¹⁹ officer explains : *"when there's a nationally imposed pay freeze, you could take an equal pay claim on behalf of a group of workers, which would*

¹⁴ Transport and General Workers' Union

¹⁵ This case was described in a working paper from the Hull Centre for Gender Studies by Sheila Cunnison who interviewed extensively this trade unionist (Cunnison, 1988) and in the documentary « Catch of the Day: Hull Fish Packers Win Equal Pay », Winning Equal Pay, TUC Library Collections, London Metropolitan University.

¹⁶ The Smales case cost the union around £300 and the EOC £5,5000 (Cunnison, 1988). By comparison the Hayward case cost £50,000, because it went to the House of Lords and the union used professional lawyers.

¹⁷ In 1987, the TGWU launched a national recruitment campaign called 'Link Up' aimed at temporary and part-time workers (Howell, 1996)

¹⁸ In 1987, the GMB published a pamphlet called « Winning a fair deal for women ». The campaign aimed at moving women's issues up the bargaining agenda. It set out 13 issues such as unsocial hours, job evaluation scheme, regarding and new technology (Howell, 1996).

¹⁹ Confederation of Health Service Employees

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3 *actually cause a shift. It can give you a way through. The employers are more likely to level*
4 *up maybe not for everyone, but for some groups”.*
5

6 If few of them would have described themselves as “feminist”, most of these men were
7 convinced that equal pay was a “bread and butter classic issue”. This working-class trade
8 union framing was linked to their own backgrounds, many of them being the sons of trade
9 unionists, as well as to their leftist political leanings and, in some cases, their close working
10 relationships with low-paid women.
11

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13 “I got a job as a care worker at sort of 18, working with elderly people. And I did that for years.
14 Usually all my colleagues were women. When I was seconded to my union, I represented those
15 same care workers. And I was always proud of the fact that I was one of them. And they always
16 kept me level-headed. When I was a UNISON lay activist and then got a job with the GMB, it
17 was very touching for me because lots and lots of care workers switched to the GMB” (former
18 male regional officer, GMB)
19

20 Often younger than their union colleagues when they became union officers, most of them
21 were less firmly embedded in the male-dominated structures of the union movement and had
22 more faith in the use of law, compared to other forms of action such as striking. As one
23 lawyer puts it: *“I think some of the more pragmatic trade unionists realised that actually*
24 *lawyers could deliver something that was useful”*. However, almost all of them had to face
25 strong opposition from their union hierarchy, especially when their union branch used to
26 represent skilled workers who did not want their jobs to be part of a re-evaluation process that
27 might have consequences for their wages. Because of the impact in terms of membership,
28 many of them had to face strong internal attacks, as their success in building up a new female
29 membership was perceived as a threat to the existing leadership. Moreover, because of the
30 strong links between the Labour Party and trade unions, some of their union colleagues and
31 superiors were afraid of “rocking the boat” and upsetting the status quo with Labour-led
32 councils.
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36 “We were pursuing a twin track strategy. We made the claim domestically and we also
37 submitted Employment Tribunal applications. We went to the women and said, fill in the union
38 application form, sign this pre-printed Employment Tribunal application form, and we’re in it
39 together. And the membership started to build. It was the best and easiest recruitment campaign
40 I have ever had in my life. The employers complained, naturally, to the late Mick Graham who
41 was the national officer. He took it up with John Edmonds, the General Secretary. And I started
42 getting people warning me off. And then the political support was withdrawn from me. I was
43 bullied and threatened, and I had a nervous breakdown. It was about internal union politics and
44 a concern that somebody was trying to build a power base and a reputation independently of the
45 autocracy that most unions have. Not true. Not guilty. My Regional Secretary thought I wanted
46 his job. He thought I was building a power base to get rid of him” (Former male organizer,
47 GMB)
48

49 Despite these internal difficulties, most of the claims they supported were successful. They
50 were made by individual applicants or by no more than 50-60 applicants, particularly in the
51 public sector, which made their administration by the employment tribunal feasible, as one
52 EOC expert stated: *“Employment Tribunal is set up to deal with a lot of employment issues,*
53 *not just discrimination. And it is designed to hear individual cases. It was never designed to*
54 *hear multiple claims, but with good lawyers on both sides and a reasonably experienced chair*
55 *of the tribunal, they could cope with fifty or sixty applicants »*. Some of them were very
56 successful, even though they took quite a long time to settle and were used by trade unions to
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improve their profile among women workers. They included the well-known case of Julie Hayward²⁰, which was supported by the GMB (and the EOC).

“She won and the good thing about the Julie Hayward case which was the first one, was she won all the way through. She won at tribunal. And she won at the Employment Appeal Tribunal, and she subsequently won at the House of Lords. So the unions were able to ride the positive publicity all the way through” (Former Head of the Equal Pay Unit, EOC)

Moreover, in the private sector, small feminized unions, such as USDAW²¹ or BIFU²², used the threat of legal action to force employers to introduce integrated job evaluation systems, which were believed to be free of sex discrimination (Arthurs, 1992) and which did indeed lead to many low-qualified female workers being upgraded (e.g. clerical staff in the banking industry). As Howell points out, “USDAW’s relative success in recruiting new female members at supermarkets is credited in large part to its aggressive use of equal pay litigation” (Howell, 1996, p.533). In the utilities sector (electricity, gas, water), many privatised companies also introduced job evaluation schemes that helped to calm the equal pay campaigns (Gilbert, Secker, 1995). Likewise, in the public sector, the major unions pushed employers (and the government) to undertake a wide pay and grading review for manual workers in local government in 1988 (Dickens, Townley, Winchester, 1988), which was seen as a way to avoid further litigation but which left open the possibility of litigation for non-manual workers, such as the case of the speech therapists²³, which marked the onset of huge multiple claims in the public sector. Many agreements of this sort were never implemented because of the extensive restructuring that took place in the 1980s in the public sector and also because of the decimation of some industries, such as printing (Dawson, 2011).

By the end of the 1980s, the number of multiple claims involving more than 1000 claimants started to increase. This significantly raised the number of claims registered by Employment Tribunals, although they were concentrated in only a few workplaces²⁴. Supported by small trade unions, such as MSF²⁵ in the speech therapists’²⁶ case or the NUM²⁷ in the case of British Coal²⁸, these cases often took a very long time to be settled and were very costly for the unions. Although they were important in terms of case law, these hard-fought equal value cases seemed to have a deterrent effect on trade unions, since they marked the end of the “golden age” for equal pay and revealed both the potential and the limitations of the equal value amendment. Employers started to make intensive of the opportunities opened up by the

²⁰ Julie Hayward was employed as a cook in the canteen and was responsible for cooking and serving midday meals to Cammell Laird employees. She claimed equal pay for work of equal value with male craft workers – a shipboard painter, a joiner and a thermal insulation engineer – all of whom received higher craft rates of basic pay than she did as a cook. It took seven years for the case to succeed. See “Cooking up a Storm: Julie Hayward’s Equal Pay Victory », Winning Equal Pay, TUC Library Collections, London Metropolitan University.

²¹ Union of Shop Distributive & Allied Workers.

²² Banking, Insurance and Finance Union.

²³ In 1985, 1200 claims from speech and language therapists (almost all of those working in the health service at the time) were submitted. The pay of the comparator group - clinical psychologists and/or hospital pharmacists - was negotiated by a separate committee. In 1993, the ECJ held that the fact that the rates of pay for two jobs had been arrived at by separate collective bargaining processes was not sufficient to provide objective justification under European legislation. See “Speaking Out for Change: Winning Equal Pay for NHS Speech and Language Therapists”, Winning Equal Pay, TUC Library Collections, London Metropolitan University.

²⁴ Between 1986 and 1995, the number of claims rose from 380 to 3000, but this figure includes multiple claims like the speech therapists and the British coal case, which were settled after 1995.

²⁵ Manufacturing, Science and Finance

²⁶ Enderby v Frenchay Health Authority (1992) C-127/92, [1993] IRLR

²⁷ National Union of Mineworkers

²⁸ British Coal Corporation v Smith [1996] IRLR 404

1984 legislation to build their defence on references to “market forces” and other material factors²⁹. Trade unionists discovered that, in practice, litigation was very complicated and adversarial.

“In the early days the cases were taken to Tribunal, which was a much less formal process then. And they used to be taken by regional officers. Employers started appealing more and more. They brought barristers in, and so it’s become a much more legalistic process than it ever was. So lots of the earlier equal pay claims, which were fairly simple, would settle. But, there started to become a resistance to it and so it became much more technical and much more expensive. People didn’t have confidence to take them” (Former female legal officer, APEX/GMB)

The intensive use of the law by some trade unions over that period can be analysed from a number of perspectives. First, in a context of huge declines in membership³⁰ and strong attacks on union rights, notably in the public sector which provides secure jobs for women, some unions took the view that the use of European legislation and especially the Directive on Equal Pay for Work of Equal Value, which was enacted into British law in 1984, could help to recruit new (female) members and strengthen collective bargaining strategies (Howell, 1996). Second, under the influence of feminist members and female officials (with assistance from the EOC), some trade unions attempted to de-construct the under-evaluation of women’s work and address gendered conceptions of work through the inclusion of women’s issues in bargaining agendas and the negotiation of new grading systems. Supported in many cases by national campaigns and national collective bargaining, legal action depended heavily on the initiative of local officers, often male, who had to fight against the fact that “women’s issues remained viewed as minority issues” and “that job segregation was largely perceived as just” (Howell, 1996, p.531).

1988-2004: Employers’ aggressive privatization strategies reignite litigation

The introduction of compulsory competitive tendering (CCT) in 1988 (Escott, Whitfield, 1995) helped to bring equal pay litigation back on to some public sector trade unionist’s agendas, as CCT had major effects on the pay and conditions of women in low-skill jobs. The idea was not to get equal pay as it had theoretically been established through the new grading system introduced in 1988, but to make sure that the privatisation of hospital and local government services could not take it away. Since some local unions had never before had recourse to litigation and as equal pay legislation was seen as difficult to handle, trade unionists first tried to use other types of legislation, such as the Transfer of Undertakings and Protection of Employees Rights³¹ (TUPE), which could be used as a major defence for not cutting the pay and conditions of women workers. Many of these actions failed and some unions were driven to bring their complaints under the Equal Pay Act 1970. One such case was that brought against North Yorkshire County Council in 1988³² by a NUPE³³ local officer, who took the lead on this landmark case. A total of 1300 catering assistants and ‘dinner ladies’ whose rates of pay had been set by reference to a 1987 assessment carried out under the local government job evaluation scheme and who were graded equally with road

²⁹ The employer can identify factors unrelated to sex and prove that they are the real reasons for the difference in pay between the woman and her comparator.

³⁰ After reaching their peak in 1979, trade union membership levels declined sharply through the 1980s and early 1990s before stabilising from the mid-1990s onward.

³¹ TUPE regulations stated that where a business entity transferred, the employees were entitled to receive the same pay and conditions.

³² Ratcliffe and others v North Yorkshire County Council ([1995] IRLR 439.

³³ The National Union of Public Employees

sweepers and gardeners (grade 1) and refuse collectors (grade 2) were to be dismissed and then re-employed at a lower rate for the Council to be able to compete with outside firms whose tenders were based on lower labour costs. Complaints were brought under the Equal Pay Act 1970, claiming equal pay with their comparator categories. This case took seven years to be settled by the House of Lords, which found that the women had been unlawfully discriminated against and that the employer must pay them at the same rate as their male comparators.

Other trade unionists also used the threat of legal action to deter privatisation. One of the most famous examples is the Cumbria story that started in 1995 with the involvement of a UNISON area organizer who launched an equal pay claim on behalf of 1,600 low-paid women (cleaners, telephonists, sterile services staff) who had been under-graded for decades. After interrupting his legal action for fear that it would encourage the Conservative government to abolish national pay structures, he resurrected it in 1997 after the election of Tony Blair. His idea was both to look for a way to raise women's pay and to fight the privatisation of the services by using equal pay claims as a way to deter investors. The government said it would cover the cost of the claim. Nevertheless, the case was pursued and was eventually settled in 2005 for a total of £300 millions.

In the wake of these trade unionists, often depicted as being ahead of their time, other trade local unionists pursued multiple claims in the public sector³⁴, mainly on the grounds of "like work" or "rated as equivalent cases". By the mid-1990s, the discriminatory nature of the 1988 pay and grading review that had been carried out in the public sector and which maintained "productivity" bonuses for men (refuse collectors, gardeners) had become very apparent. A GMB regional organizer in the North East initiated a major claim against Cleveland County Council that aimed, first, to challenge the effects of CCT on women's pay and conditions (sex discrimination claim) and, second, to challenge the pay differential between women and men whose jobs were rated equivalent but whose wages were different (equal pay claim).

"I said to them that if you're rated as equivalent as a man you're entitled to the same pay. You get the same pay, but the men are getting 40% an hour more. Now, they knew these gardeners because these gardeners came to cut the grass and everything. So they could see how the men worked and they could see how they worked. And I said, it's supposed to be productivity. But they get it for their holidays. They get it for sickness. It's superannuated so their pension is higher. We've asked the Council why the men get it and you don't get it. And the Council has said that the men need an incentive to work harder. The women already work hard enough and don't need it. The men had to have an incentive... the women already did it and they didn't need it." (Former male regional organizer, GMB)

The subordination of women's interests to other "general" interests (such as fighting privatisation) has been highly criticised by several lawyers who consider that trade unions have always pursued cases for reasons unrelated to getting equal pay for women. But this famous case was successful. In 1996, the 1500 "dinner ladies" celebrated a £4 million negotiated settlement following industrial tribunal claims under equal pay laws. The women had already secured over £1 million in a sex discrimination case. Moreover, this case had immense implications for other local authorities, as every local authority operated bonus and productivity schemes for male manual workers. Almost none offered bonus and productivity

³⁴ Because of the lack of transparency and the individualized nature of the pay systems, the end of centralised collective bargaining and the huge decline in membership, very few cases have been supported by trade unions in the private sector since the end of the 80s.

schemes to female manual workers. As a lawyer puts it: “*the result of the Cleveland case was to expose a national problem, because the pay structure in local government is almost replicated everywhere*”. Consequently, and following the settlement of the speech therapists’ case in 1993, where the ECJ suggested that separate collective bargaining arrangements could not be used as an argument against an equal pay claim³⁵, the Conservative government decided to launch negotiations on harmonising the conditions of former administrative, professional, technical and clerical (APTC) staff and manual workers in local government (single status). In addition, a new job evaluation scheme was developed to address grading and equal pay issues. In 2004, the Agenda for Change collective agreement to be applied to all directly employed NHS staff (with the exception of doctors, dentists and some very senior managers) was also negotiated to avoid further litigation and implement equality within the NHS. The negotiation of these two collective agreements that were explicitly designed to address gender pay inequalities highlights how the use of the law can challenge cultural ideologies and gendered work assumptions (Albiston, 2008) and produce “radiating effects” (Colling, 2011; McCann, 1994). However, this story also shows that social change is often driven by minority groups who have had to fight against considerable internal and external resistance. By contrast, the last period of time (2004-2014) that is not scrutinized in this article, clearly shows the limits of local trade unionists’ action when legal processes become very legalistic in a context of mass litigation, recurrent use of lawyers, repeated appeal strategies by employers and centralisation of claims’ administration within trade unions (McLaughlin, 2014; author, 2013).

Conclusion

Most studies of unions and equality have looked into the evolution of equality policies and the effect of unions’ national structures, pointing out the active role of feminists (and the limits of their action, see Guillaume, 2013). Less work has been done on the implementation of these policies and, above all, very little attention has been paid to the way equality is framed and translated into ordinary union work. And yet most of the interviews conducted for this study reveal the crucial role played by a small number of local trade unionists in the development of equal pay litigation. However we might assess the efficiency of the law, their initiatives, whether offensive or defensive, were crucial in persuading their union hierarchy that the case they wanted to support was solid and worth committing to and convincing women workers that they had a case. The gendered job segregation and the difficulty of understanding what ‘equal value’ meant combined to prevent low-paid women from thinking themselves as equal. Getting women claimants on board also proved very difficult as employers tried to deter them from putting in claims by offering them settlement deals (before Christmas) that they sometimes preferred to accept for fear of jeopardising the possibility of getting compensation. The adversarial nature of the legal procedure, which involves comparing oneself to a male comparator who may also be a friend and/or partner, was also quite difficult for the claimants.

While litigation remains a very unusual form of action for trade unionists, an understanding of the conditions under which some of them have had recourse to law raises different questions. First, it brings up the issue of why trade unions that have strong financial resources and tend to characterize their members as rights holders (Vanhala, 2011), two conditions that should theoretically encourage litigation strategies, have ended up seeing litigation as a last resort. One explanation can be found in shared cultural frameworks regarding the role of trade unions and the value attributed to collective bargaining as a preferred mode of action (Colling,

³⁵ Enderby v. Frenchay Health Authority, C-127/92 (1993) IRLR 591 (ECJ).

2011). Other entrenched union practices in terms of separate collective bargaining may also account for the difficulties trade unionists have had in grasping the potentialities of the “equal value” concept and challenging gendered classification systems. If having a narrow mandate has been described as being very attuned with the use of litigation (Alter, Vargas, 2000), the large scope of activities and the multiple and competing interests of members, can make unions quite circumspect toward the defence of individual rights in courts. Even when unionists are convinced by the potentiality of litigation for raising members’ rights and/or the possibility of using legal action as a lever for collective bargaining, the decision (or not) to take legal action cannot be understood without looking at the interactions between local and national levels, the cooperation and divisions amongst the union movement.

Second, this study highlights the crucial role of workplace power relations in shaping rights campaigns. Depending on the period, equal pay litigation has been facilitated or even encouraged by employers’ weakness, ignorance or goodwill, or opposed by their adversarial strategies. Unions’ reluctance to litigate is reflected in the fear that litigation might increase employers’ intransigence or force them to resort to job and service cuts. Trade unionists have been caught between the necessity to hold on while employers appealed and appealed, sometimes successfully, and the fear that the union could lose. Interestingly, most of them have ended up relying heavily on the support of their lawyers with whom they built very strong relationships over the years. By their action, they have managed to keep equal pay on the public and union agendas, and have helped to challenge some of the mechanisms that contribute to the under-evaluation of women’s work. Despite all the legal hurdles, they have demonstrated that the use of the law might help to contest entrenched beliefs about work and gender (Albiston, 2005).

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For Peer Review

Table 1. Characteristics of the interviewees

Position	Union	Sex	Age
Trade unionists			
Former Senior Policy Officer	TUC (ex NALGO)	Woman	65-69
Senior Policy Officer	TUC	Woman	40-44
Women's Equality Officer	TUC	Woman	30-34
National Women's Officer	UNISON (ex NALGO)	Woman	55-59
Former National Equality Officer	UNISON (ex COHSE)	Woman	50-54
National Officer, Health service Group	UNISON (ex COHSE)	Man	45-49
National Officer, Health service Group	UNISON (ex NALGO)	Man	35-39
Senior Regional Officer	UNISON (ex NALGO)	Woman	50-54
Regional Organiser	UNISON (ex NUPE)	Man	45-49
Regional Women's Officer	UNISON (ex NALGO)	Woman	35-39
Regional Organiser	UNISON	Woman	45-49
Researcher	UNISON (ex GMB)	Woman	60-64
Assistant General Secretary	UNITE (ex TNG)	Woman	60-64
Assistant General Secretary	UNITE (ex MSF)	Woman	60-64
Former National Officer	UNITE (ex TNG)	Woman	65-69
National Officer, Local Government Group	UNITE (ex MSF)	Woman	40-44
Regional Organiser	UNITE (ex GMB)	Man	50-54
National Officer for Equalities	UNITE (ex AEU - TNG)	Woman	40-44
Former Equality Officer	UNITE (ex GPMU)	Woman	50-54
Researcher	PCS	Man	50-54
Regional Organiser	UNISON (ex NUPE)	Man	50-54
Legal practioners			
Employment Judge	Employment Tribunal	Woman	45-49
Employment Lawyer	UNISON	Man	45-49
Head of Equality Department	Thompson Solicitors	Woman	60-64
Lawyer	Thompson Solicitors	Woman	50-54
Lawyer	Cross Solicitors	Man	50-54
Lawyer	Leigh Day & Co Solicitors	Man	30-34
Former Equal pay campaigner	Action 4 Equality (ex GMB)	Woman	60-64
Former Equal pay campaigner	Action 4 Equality (ex GMB)	Man	60-64
Former Equal pay campaigner	Action 4 Equality (ex NUPE)	Man	50-54
Former Barrister	Old Square Chambers	Woman	65-69
Experts			
Former Head of Equal Pay Unit	EOC	Woman	65-69
Independent expert in job evaluation		Woman	60-64
Head of Equality Department	ACAS	Man	55-59

Table 2 : Equal pay Claims, 1976-2011. Source : Employment Tribunal Statistics